No. 17-1351

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal of a Preliminary Injunction Issued by the
United States District Court for the District of Maryland
Case No. 8:17-cv-00361, Hon. Theodore D. Chuang

BRIEF OF MEMBERS OF THE CLERGY; THE RIVERSIDE CHURCH IN THE CITY OF NEW YORK; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1351 Caption: International Refugee Assistance Project v. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Americans United for Separation of Church and State, Bend the Arc, the Southern Poverty Law Center,
(name of party/amicus)

the Riverside Church in the City of New York, and Members of the Clergy.

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Richard B. Katskee Date: 4/19/2017

Counsel for: Amici

CERTIFICATE OF SERVICE

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I certify that on 4/19/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are members of the clergy, a house of worship, and religious and civil-rights organizations. *Amici* represent diverse beliefs and faith traditions but share a commitment to preserving religious freedom for all people.

The issues presented here have important ramifications for persons living across the United States and around the world. If the Executive Order is allowed to go into effect, family members living in different countries will be estranged. People fleeing violence in war-torn regions will be trapped in life-threatening circumstances. And religion (albeit couched in the language of national origin) will determine whether hundreds of thousands of people have access to the opportunities of life and travel in the United States.

What is more, the Muslims targeted by the Executive Order will not be the only people affected by its implementation. The seismic shift in this Nation's treatment of a religious minority will be felt by families, neighborhoods, houses of worship, local businesses, and other institutions. Many will suffer the loss of valued employees, customers, relatives, and members of the community. And all will feel the loss as our Nation reneges on its historic commitment to preserving religious freedom and welcoming religious diversity.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

Because the Executive Order discriminates against Muslims based solely on their faith, and because constitutional injuries will accrue immediately if the Executive Order takes effect, *amici* have a strong interest in ensuring that the preliminary injunction remains in place.

The *amici* are:

- The Reverend Dr. Amy Butler, Senior Minister, The Riverside Church, New York, New York.
- Michael Hidalgo, Lead Pastor, Denver Community Church, Denver, Colorado.
- The Reverend Jim Keat, Associate Minister, The Riverside Church, New York, New York.
- Pastor George Mekhail, Director of Partnerships & Innovation, The Riverside Church, New York, New York.
- Pastor Doug Pagitt, Solomon's Porch, Minneapolis, Minnesota.
- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- The Riverside Church in the City of New York.
- The Southern Poverty Law Center.

More detailed descriptions appear in the Appendix.

INTRODUCTION

Despite the Constitution's clear proscriptions against religious discrimination, President Trump has for sixteen months promised "a total and complete shutdown of Muslims entering the United States" (*Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP FOR PRESIDENT (Dec. 7, 2015), http://bit.ly/1jKL2eW), insisting that "we have to have a ban . . . it's gotta be a ban" (*Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire*, C-SPAN 28:00 (Feb. 8, 2016), http://cs.pn/2kY4f1T).

President Trump enacted this promised Muslim ban in January. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). He asserted that the ban was legal because it targeted overwhelmingly Muslim countries without using the word "Muslim." *See, e.g.*, Anna Giaritelli, *Conway Explains Why 'Muslim, Islam' Not in Trump Refugee Order*, WASH. EXAMINER (Jan. 27, 2017), http://washex.am/2nmZv2Z. But courts across the country were quick to see through that façade, holding that this original Executive Order was incompatible with our Constitution's guarantees of religious freedom. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017).

So President Trump tried again. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). But as the President's Senior Policy Adviser, Stephen Miller, explained, the replacement Executive Order pursues the "same basic policy outcome" as the first. Matt Zapotosky, *A New Travel Ban with 'Mostly Minor Technical Differences'? That Probably Won't Cut It, Analysts Say*, WASH. POST (Feb. 22, 2017), http://wapo.st/2mmmECm. It thus remains an affront to our constitutional principles. *See Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1011673, at *15 (D. Haw. Mar. 15, 2017). It is properly enjoined.

ARGUMENT

"The First Amendment mandates governmental neutrality between religion and religion," forbidding official discrimination. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord, e.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Larson v. Valente*, 456 U.S. 228, 246 (1982). By mandating neutrality, the Religion Clauses "seek to 'assure the fullest possible scope of religious liberty and tolerance for all' [and] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (citations omitted). Additionally, the equal-protection component of the Fifth Amendment's Due Process Clause prohibits invidious discrimination based on religion and national origin. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Ignoring these clear constitutional commands, President Trump has singled out one religious group—Muslims—for official disfavor and maltreatment. By instituting a punishing ban on Muslim immigrants and visitors, the government runs roughshod over core First and Fifth Amendment protections. Because the Executive Order violates First Amendment rights, the injuries that it inflicts are irreparable as a matter of law. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520–21 (4th Cir. 2002). And because those harms are imminent and extraordinary, the preliminary injunction should be upheld.

A. Plaintiffs Are Likely To Succeed On Their Establishment Clause And Equal Protection Claims.

1. The Executive Order violates the Establishment Clause.

The Establishment Clause mandates that "government may not favor one religion over another, or religion over irreligion," "religious choice being the prerogative of individuals." *McCreary*, 545 U.S. at 875. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Thus, when the government singles out one denomination for unfavorable treatment, its action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246; *see also Awad v. Ziriax*, 670 F.3d 1111, 1129–30 (10th Cir. 2012) (applying strict scrutiny to and invalidating state law disfavoring Islam).

Additionally, governmental action must always have both a preeminently secular purpose (*McCreary*, 545 U.S. at 864; *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (Establishment Clause violated when "'government's actual purpose is to endorse or disapprove of religion'")) and a "principal or primary effect . . . that neither advances nor inhibits religion" (*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). Thus, the Establishment Clause is violated when government makes "'adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

Under every test, history and context matter. The challenged action's asserted purpose, viewed from the standpoint of "an objective observer," "has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 862–64 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). And because "reasonable observers have reasonable memories," the Court must not "turn a blind eye to the context" but must "look to the record of evidence showing the progression leading up to" the challenged action. *Id.* at 866, 868 (quoting *Santa Fe*, 530 U.S. at 315); *see also Washington*, 847 F.3d at 1167.

What is more, the hypothetical "'objective observer' is presumed to know far more than most actual members of a given community" (*Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 n.16 (10th Cir. 2008)) and "to be familiar with the history of the government's actions and competent to learn what history has to show" (*McCreary*, 545 U.S. at 866). Indeed, even officially repudiated past acts are not "dead and buried" but remain in the objective observer's memory, affecting how the final governmental action is viewed. *Id.* at 870. Hence, as a matter of law, the public's understanding of the replacement Executive Order and the entire public history of its genesis and evolution must be considered in determining whether the Establishment Clause is violated. *See, e.g.*, *id.* at 866; *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 801 (10th Cir. 2009).

Here, the objective observer can come to but one conclusion: President Trump's words and deeds bespeak anti-Muslim animus. The replacement Executive Order, like its predecessor, is an impermissible ban on Muslims.

a. *The history and context of the Executive Order show anti-Muslim animus.*

The replacement Executive Order is the culmination of sixteen months of anti-Muslim rhetoric and actions by President Trump and his staff. And the government has failed to show that the order genuinely serves national-security concerns.

President Trump spent more than a year on the campaign trail promising "a total and complete shutdown of Muslims entering the United States." *Donald J. Trump Statement, supra.* He repeatedly disparaged and vilified an entire religion and all its adherents, declaring it "hard to separate . . . who is who" between Muslims and terrorists. Anderson Cooper 360 Degrees, *Transcripts*, CNN (Mar. 9, 2016), http://cnn.it/2jJmaEC. He insisted that, without a Muslim ban, "hundreds of thousands of refugees from the Middle East" would attempt to "radicaliz[e]" and "take over our children." *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN 20:05 (June 13, 2016), http://cs.pn/2k7bHGq. He warned that Syrian refugees would "be a better, bigger, more horrible version than the legendary Trojan Horse." *Id.* And when he "talked about the Muslims," he explained: "we have to have a ban . . . it's gotta be a ban." *Presidential Candidate Donald Trump Town Hall Meeting, supra.*

When called to task for this blatant religious animus, candidate Trump rewrote the lyrics without changing his tune: "So you call it territories. OK? We're gonna do territories." *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), http://cbsn.ws/29NrLqj. Lest the point be lost on anyone, he candidly explained that because "[p]eople were so upset when [he] used the word Muslim," he would now be "talking territory instead[.]" *Meet the Press*, NBC NEWS (July 24, 2016), http://nbcnews.to/29TqPnp.

Following through on his pledge, President-elect Trump directed Rudy Giuliani (a vice chair of the President's transition team) to figure out how the "Muslim ban" could be implemented "legally." Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally,'* WASH. POST (Jan. 29, 2017), http://wapo.st/2jLbEO5. President Trump then barred entry to nationals from seven overwhelmingly Muslim countries. *See* Exec. Order No. 13,769. When he signed this first Executive Order, he read its title aloud, "Protection of the Nation from Foreign Terrorist Entry into the United States," adding, "We all know what that means." *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), https://tinyurl.com/zbnvnkp; *see also, e.g.*, Giaritelli, *supra*. That same day, he explained that the government would now favor Christian refugees over Muslims. David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017), http://bit.ly/2kCqG8M.

The Ninth Circuit, the U.S. District Court for the Western District of Washington, and the U.S. District Court for the Eastern District of Virginia all recognized that this first Executive Order was the promised Muslim ban and held that it was unconstitutional. *See Washington*, 847 F.3d at 1151; *Washington*, 2017 WL 462040; *Aziz* 2017 WL 580855.

Blocked in court, President Trump promised to issue a supplemental Executive Order that would be a continuation and extension of the enjoined one. *See* Ronn Blitzer, *President Trump Signs New Travel Ban Executive Order*, LAW NEWZ (Mar. 6, 2017), http://bit.ly/2nesEhE. And he continued to insist that immediate, "extreme" measures were needed to prevent terrorists from entering the country. *See, e.g.*, *Meet the Press*, *supra*; Darlene Superville, *Trump Lashes Out at Federal Judge Over Ruling on Travel Ban*, ST. LOUIS POST-DISPATCH (Feb. 4, 2017), http://bit.ly/2n7zuso. Yet several promised dates for the new executive order came and went before the administration finally announced that the President would issue it on March 1—the day after the President was scheduled to deliver his first address to Congress. Phil McCausland & Hallie Jackson, *Donald Trump Expected to Sign New Immigration Order: A Timeline*, NBC NEWS (Mar. 6, 2017), https://tinyurl.com/hk4zn7m.

But the President ultimately decided to "delay[] plans to sign a reworked travel ban in the wake of positive reaction to his first address to Congress." *See* Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN (Mar. 1, 2017), http://tinyurl.com/zc9kwcg. The administration described the stall (of nearly a week, as it turned out) as letting the replacement Executive Order "have its own 'moment'"—in other words, ensuring that it did not pull focus from the favorable press coverage. *Id.*

Eventually, President Trump did issue his replacement Executive Order No. 13,780, which bans from the United States persons from six of the same overwhelmingly Muslim countries as the first Executive Order, while creating special enhanced vetting for persons from the seventh. *Id.* §§ 1(f), 2(c), 4. The replacement does make some changes, such as excluding lawful permanent residents, who had previously been stripped of their rights. *See id.* § 3(b). But President Trump forthrightly describes the replacement as just "a watered-down version of the first one," lamenting that "[w]e ought to go back to the first one . . . which is what I wanted to do in the first place." Alexander Burns, *Federal Judge Blocks Trump's Latest Travel Ban Nationwide*, N.Y. TIMES (Mar. 15, 2017), http://nyti.ms/2np9Kbh; *id.* (video). As his senior policy adviser explained, the replacement achieves the "same basic policy outcome" as the original. *See* Zapotosky, *A New Travel Ban*, *supra*.

Through everything, the President has insisted that his Muslim ban is crucial to national security. Yet his first Executive Order was crafted not by national-security experts (*see Aziz*, 2017 WL 580855, at *9), but by political operatives with a public record of hostility toward Muslims (Evan

Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), http://cnn.it/2kGdcZy; Andrew Kaczynski, *Steve Bannon in 2010: 'Islam Is Not a Religion of Peace. Islam Is a Religion of Submission,'* CNN (Jan. 31, 2017), http://cnn.it/2knpxSE). And the Department of Homeland Security has since reported that "citizenship is an 'unreliable' threat indicator and that people from the seven [now six] countries have rarely been implicated in U.S.-based terrorism" (Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), http://wapo.st/2lOkpKW), strongly suggesting that the President is still pursuing his Muslim ban without regard to expert assessments or legitimate national-security needs.

b. *If allowed to take effect, the Executive Order will disfavor and injure Muslims.*

The inevitable (and intended) effects on Muslims are apparent from the replacement Executive Order's bare text. Like the original, the replacement "talk[s] territory" (*Meet the Press*, *supra*) by identifying countries that are almost entirely Muslim and subjecting those who were born in or come from the countries—i.e., Muslims—to harsh legal disabilities. Exec. Order No. 13,780 §§ 1(f), 2(c). Sections 1 and 2 exclude from the United States persons from Iran (99.5% Muslim), Libya (96.6% Muslim), Somalia (99.8% Muslim), Sudan (90.7% Muslim), Syria (92.8%

Muslim), and Yemen (99.1% Muslim). *See id.* §§ 1(f), 2(c); PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), http://bit.ly/2k4Us8B. Section 4 requires additional screening procedures for persons from Iraq (99.0% Muslim). PEW RES. CTR., *supra*, at 47. Section 6(a) blocks entry of all refugees, also disproportionately affecting Muslims, who make up a growing plurality of refugees resettled in the United States. Jens Manuel Krogstad & Jynnah Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), http://pewrsr.ch/2kk7ro8 (in 2016, "Muslims made up nearly half (46%) of refugee admissions"). And Section 11 requires acquisition and dissemination of "information regarding . . . so-called 'honor killings' in the United States by foreign nationals" (Exec. Order No. 13,780 § 11(a)(iii)), employing a common tactic to evoke negative and misleading stereotypes about Islam as uncivilized and dangerous (*see* Leti Volpp, Opinion, *Trump's mentions of 'honor killings' betray the truth of his 'Muslim ban,'* THE HILL (Feb. 22, 2017), http://tinyurl.com/j6d2b22).

This disfavored status harms not only Muslims abroad but also Plaintiffs and many other people and institutions lawfully in the United States. For example, U.S. residents (including U.S. citizens) with children, spouses, and siblings in the targeted countries will be prevented from reuniting with their loved ones. *See* First Am. Compl. ¶¶ 154, 167–68, 182, 185, 198, 205, 210. Students and professors in the United States from the targeted countries will be unable to travel abroad for research and academic conferences. *See id.* ¶¶ 177–78. And Muslims nationwide will experience fear and anxiety over the government's condemnation of their faith and its adherents. *See id.* ¶¶ 155, 169, 179, 199; *Hawai'i*, 2017 WL 1011673, at *10–11; *see also Awad*, 670 F.3d at 1122–23.

c. *The Executive Order is an impermissible denominational preference and has the unlawful purpose and effect of disfavoring Islam.*

1. Because the replacement Executive Order was motivated by and embodies religious animus toward Muslims, it is "suspect" and requires "strict scrutiny in adjudging its constitutionality," triggering the most stringent compelling-interest test. *Larson*, 456 U.S. at 246.[2]

President Trump's and his aides' and advisers' clear, unambiguous statements during the campaign, after the election, and since taking office (only some of which are detailed above), along with the substantial and very public history leading up to both Executive Orders, all bespeak official hostility toward Muslims—a religious minority in the United States. The President and his campaign surrogates and policy advisers promised a

[2] The government argues (at 35) that Plaintiffs' Establishment Clause claims must be adjudicated under the deferential review of *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), without regard to settled Establishment Clause jurisprudence. But as further explained in Section A.2.g, *infra*, because the stated national-security rationale is a sham, the Executive Order was not issued for a "bona fide reason." Thus *Mandel* is inapplicable.

"total and complete shutdown of Muslims entering the United States." *See Donald J. Trump Statement*, *supra*; Brody, *supra*. Their first Executive Order delivered on that promise. *See Aziz*, 2017 WL 580855, at *9. So does its replacement. *See Hawai'i*, 2017 WL 1011673, at *14. *Larson*'s compelling-interest test therefore applies—and cannot be satisfied.

The objective asserted by the government is "protect[ing] its citizens from terrorist attacks, including those committed by foreign nationals." Exec. Order No. 13,780 § 1(a). To be sure, preventing terrorism is a compelling interest. But the Executive Order must also be "closely fitted to further the interest." *Larson*, 456 U.S. at 248. It isn't.

A policy of suddenly, flatly, and universally excluding people from six Muslim countries without regard to whether they have any connection to terrorism is not the least restrictive means to protect against attacks. Individuals from the countries listed in the Executive Orders have, collectively, killed ***zero*** people in terrorist attacks in the United States since 1975. Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx. Not one of the top five countries of origin for foreign-born perpetrators of terrorism in the United States is covered by the Executive Orders. *See id.* Homegrown terrorism—by non-Muslims—is a far greater threat and causes significantly more deaths than foreign-born terrorists do. *See, e.g.*, Ellen

Nakashima, *Domestic Extremists Have Killed More Americans than Jihadists Since 9/11. How the Government Is Responding*, WASH. POST (Oct. 15, 2015), http://wapo.st/1Qh8Kft. Yet the Executive Orders leave that problem entirely unaddressed. And the Executive Orders do not cover any of the non-Muslim countries that the U.S. Department of State has identified as "Terrorist Safe Havens." *Cf.* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2015, https://tinyurl.com/jap2fpf. The policy's fit with the government's asserted interest is not merely loose; it is nonexistent.

The incantation of 'national security' also does not explain the President's decision to delay issuing the supposedly crucial replacement Executive Order so that he could enjoy a honeymoon of favorable press coverage following his address to Congress. If there really were a grave terrorist threat that warranted an immediate and decisive ban on immigration, as the President has insisted, it is hard to understand how some complimentary news stories could so readily trump the security of the nation. Add to that the history and provenance of both Executive Orders and the fact that the Department of Homeland Security has entirely debunked citizenship and national origin as reliable indicators of security threats (*see* Zapotosky, *DHS Report, supra*), and the inevitable conclusion is that the policy is nothing but bare-knuckled religious animus that is insupportable under *Larson*.

2. For related reasons, the replacement Executive Order also violates the Establishment Clause because it lacks a preeminently secular purpose and preeminently secular effect. Indeed, an objective observer looking at the "context" and "record of evidence" (*McCreary*, 545 U.S. at 868) could hardly help but see that the Executive Order is the President's promised (and flatly unconstitutional) Muslim ban in patched clothes. No major political figure in recent times has made as many explicit and consistent statements denigrating a religious faith, nor promised so openly to discriminate against its adherents. When a policy so clearly implements religious animus, the President who promulgated it must be taken at his word.

The acts and public statements of President Trump, his surrogates, and the advisers in his administration who developed the Executive Orders, as well as the broader context in which the Executive Orders were issued, all underscore to the reasonable observer that the government is continuing to pursue a Muslim ban (*see Hawai'i v. Trump*, No. 17-00050, 2017 WL 1167383, at *6 (D. Haw. Mar. 29, 2017) (describing replacement Executive Order's historical context as "full of religious animus, invective, and obvious pretext")). The objective observer sees "a purposeful change of *words* . . . effected without any corresponding change in *content*" (*Kitzmiller v. Dover*

Area Sch. Dist., 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005)), thus continuing to convey the same strong message of governmental condemnation of Islam, and the same accompanying message of official preference for other faiths. The replacement Executive Order continues to declare unequivocally that Muslims are "'outsiders, not full members of the political community,'" and that non-Muslims are "insiders, favored members of the political community" (*Santa Fe*, 530 U.S. at 309–10 (citation omitted)).

This Court should not, and as a matter of law cannot, "turn a blind eye" to any of that. *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315); *see, e.g.*, *Washington*, 847 F.3d at 1167; *Hawai'i II*, 2017 WL 1167383, at *6 ("The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has."). For the objective observer, history matters. Context matters. "[P]urpose matters." *McCreary*, 545 U.S. at 866 n.14. Thus, "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id.* "Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether [an Executive Order] follows on the heels of [statements] motivated by sectarianism, or whether it lacks a history demonstrating that purpose." *Id.* And here, the government's proffered justification must be deemed either a "sham" or "merely secondary" to the impermissible purpose (*id.* at

864) to disfavor, vilify, and shun Muslims (*see Hawai'i*, 2017 WL 1011673, at *14 ("Any reasonable, objective observer would conclude . . . that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." (quoting *McCreary*, 545 U.S. at 864))).

Moreover, that the replacement Executive Order allows the victims of its animus to apply for waivers (*see* Exec. Order No. 13,780 § 3(c)) does not cure the constitutional defect. The Executive Order still subjects those from overwhelmingly Muslim countries to special, more onerous procedures for entering the United States; the requirement of a waiver and the hurdles to obtaining one are part of the problem, not its solution.

Nor does it make a whit of difference that many of the damning statements declaring the official objective here came before the inauguration (*cf.* Gov't's Br. 45). Not only have President Trump and his administration since adopted, repeated, and doubled down on those earlier declarations, but as Judge Brinkema of the U.S. District Court for the Eastern District of Virginia observed, "a person is not made brand new simply by taking the oath of office." *Aziz*, 2017 WL 580855, at *8. What candidate Trump and President-elect Trump promised illuminates what President Trump has done.

3. *Amici* do not suggest that the President's words and deeds must "forever taint" (Gov't's Br. 48) all future attempts to address genuine threats to national security. But the Government's assertion (*id.*) that the replacement Executive Order passes muster because it was revised "in response to concerns raised by courts" misses the point. That the replacement Executive Order may impose its discriminatory harms on a somewhat smaller set of Muslims or that it may have been drafted with an eye to evading judicial review cannot wash away the clear, unambiguous, and undiluted history of anti-Muslim animus that animates it. The largely cosmetic changes do not erase the fact that the administration expressly seeks the "same basic policy outcome" as the earlier, enjoined order did (Zapotosky, *A New Travel Ban*, *supra*), by essentially the same means, and without any additional research, support, or justification for the measures taken. Only "genuine changes in constitutionally significant conditions" may cure constitutional defects. *McCreary*, 545 U.S. at 874. There surely are scores of measures that the President could implement to keep the country safe without treating adherents to Islam as "hard to separate" from radical terrorists.

4. Finally, it is of no moment that the seven countries targeted in the Executive Orders were subjected to heightened immigration measures under previous administrations. President Trump's Executive Orders are

not "the same government action" (*id.* at 866 n.14) as those applied to the countries before. Unlike the heightened visa requirements implemented earlier, President Trump has uniformly banned all immigrants and visitors from the targeted countries. *Cf. Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 904–05 (7th Cir. 2016) (holding that excluding all Syrian refugees as dangerous *per se* is unlawful discrimination). This flat ban sends the strong message that all Muslims bear collective responsibility and are under collective suspicion for what some people—from entirely different countries—have done, supposedly in the name of Islam.

2. The Executive Order violates equal protection.

The equal-protection component of the Due Process Clause forbids invidious discrimination on the basis of religion or national origin. *Dukes*, 427 U.S. at 303. This prohibition applies to governmental actions that are discriminatory on their face or in their purpose. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). Hence, though courts generally do not look behind the intent of official action, "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified," and strict scrutiny applies. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

a. The replacement Executive Order discriminates on the basis of religion against immigrants and visitors to the United States, and also against U.S. residents who wish to bring their families to this country. As detailed above, anti-Muslim sentiment animates the order. *See* Section A.1.a, *supra*. That is enough to trigger strict scrutiny.

The government's contention that the replacement order looks to country of origin rather than religion hardly solves the problem. For not only is nationality used as a proxy for religion, but national-origin discrimination violates equal protection regardless. And because the government has no legitimate purpose for that discrimination, much less a compelling interest, the replacement Executive Order cannot stand.

b. Again, the historical background for the replacement Executive Order and the sequence of events leading up to it make the anti-Muslim animus clear. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [protected class] than another." *Davis*, 426 U.S. at 242; *see Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995) (noting that historical background and sequence of events matter in determining discriminatory intent). Discriminatory purpose may also be inferred either from "[d]epartures from the normal procedural sequence," or from the circumstance that "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267.

There can be no doubt that the Executive Order "bears more heavily" (*Davis*, 426 U.S. at 242) on Muslims than on other religions: More than 90% of the citizens in all the affected countries are Muslim. PEW RES. CTR., *supra*, at 45–50. That is no mere happenstance. As explained in Section A.1.a above, the replacement Executive Order, like the first one, was designed to fulfill President Trump's repeated promises to ban Muslims. *Donald J. Trump Statement*, *supra*. The first Executive Order was intended to implement the discrimination "legally" (Wang, *supra*)—whatever that may mean—and the replacement was designed to achieve the "same basic policy outcome" (Zapotosky, *A New Travel Ban*, *supra*) without triggering "concerns . . . by courts" (Gov't's Br. 48). The discriminatory purpose demands strict scrutiny.

c. Discrimination on the basis of national origin—another protected status—is even more obvious. The replacement Executive Order treats everyone from six countries as inherently dangerous, without looking to anything other than birthplace—and by necessary inference, religion. The least restrictive means to achieve a compelling interest this is not.

d. The replacement Executive Order not only represents a radical departure from the moral commitment of "a Nation founded by religious refugees and dedicated to religious freedom" (*Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring in the judgment), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)), but also entails significant procedural and substantive departures from usual decision-making (*see Arlington Heights*, 429 U.S. at 267).

Most notably, the Executive Order violates long-standing immigration law, which prohibits discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). And beyond ignoring this substantive law, the administration has bucked normal procedure, too. For example, the President has ignored repeated and broad consensus—even from those in his own administration—that the Executive Orders will do nothing to make the country safer but instead will make us all less safe. *See* Lara Jakes, *Trump's Revised Travel Ban Is Denounced by 134 Foreign Policy Experts*, N.Y. TIMES (Mar. 11, 2017), http://tinyurl.com/zzq8gfa; Zapotosky, *DHS Report*, *supra*. Again, despite insisting that his ban is urgently needed, the President delayed issuance of the replacement Executive Order to bask in positive media attention. *See* Jarrett, *supra*. A government that has identified genuine, immediate, and overwhelming need for extreme measures to keep the nation and its people safe would surely not sacrifice all of that to prolong a favorable news cycle.

e. Simply stated, the President's discrimination on the basis of religion and national origin is "a denial of the equal protection of the laws to the less favored classes" (*Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900)). That discrimination receives strict scrutiny because it is "so seldom relevant to the achievement of any legitimate state interest" that it is "deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). And as explained in Section A.1.c above, the Executive Order cannot withstand this review.

f. To be sure, "facially legitimate and bona fide" immigration decisions receive deference when made under delegations of authority and in accordance with policies set by Congress. *Mandel*, 408 U.S. at 769. But the Executive Branch does not have—and Congress has not purported to confer—unlimited, unchecked authority to discriminate on the basis of religion or on the basis of national origin as a proxy for religion. As the Ninth Circuit explained, *Mandel*'s limited review applies when the Executive Branch makes immigration decisions "based on the application of a congressionally enumerated standard to the particular facts presented." *Washington*, 847 F.3d at 1162. Thus, deference was appropriate in *Mandel* because the Attorney General, in denying a single visa, had "exercised [only] the plenary power that Congress delegated to the Executive." 408 U.S. at

769. By contrast, permissive rational-basis review does not apply to the "President's *promulgation* of sweeping immigration policy" (*Washington*, 847 F.3d at 1162 (emphasis in original)), which is the province of Congress, not the President acting alone.

Apparently to take advantage of *Mandel*'s permissive review, the replacement Executive Order purports to borrow its list of disfavored countries from lists previously compiled by Congress and by the Secretaries of State and Homeland Security. *See* Exec. Order No. 13,780 § 1(b)(i). But the purpose of those earlier lists was simply to remove the six countries (and Iraq) from the special streamlined entry procedures of the Visa Waiver Program, not to block entry from these countries wholesale.[3] There is no congressional authorization or delegation to ban nationals of the six countries (or any countries) altogether. Instead, President Trump has on his own initiative (and without regulatory fact-finding) simply enshrined religious discrimination as foreign policy, lightly camouflaging it as a ban on territories—i.e., national origin, another suspect class—in the hope of escaping meaningful judicial review. "So you call it territories. OK? We're gonna do territories." *The Republican Ticket*, *supra*. Whether the

[3] The Visa Waiver Program permits nationals of certain countries to enter the United States without a visa. 8 U.S.C. §§ 1187 *et seq*.

replacement order is analyzed through the lens of religious or national-origin discrimination, *Mandel* simply has no bearing.

g. But even if the Court were to apply *Mandel*'s more deferential review, the replacement Executive Order would still fail. Governmental action is not "bona fide" under *Mandel* if it is taken in bad faith. *See Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (courts may "look behind" government's stated purpose on showing of bad faith on part of executive official whose actions are being challenged); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (a plaintiff may demonstrate that proffered reasons for governmental action are not bona fide by making "an affirmative showing of bad faith"); *Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982) (discrimination "against a particular race or group" would not be "'legitimate and bona fide' within the meaning of *Kleindienst v. Mandel*").

Here, bad faith is self-evident. As explained above, the text of the replacement Executive Order and the circumstances surrounding its issuance demonstrate that it was and is motivated by anti-Muslim animus, not by reasoned analysis of national-security concerns. Indeed, the replacement Executive Order continues to target majority-Muslim countries in the face of the government's own finding that national origin is not a useful predictor of terrorist intent—and despite the unvarnished opinion of national-security experts that the administration's policy will sow mistrust and engender hostility in the international community, making our nation not more safe but less. *See* Jakes, *supra*. The order therefore fails even under the *Mandel* standard.

* * *

"[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights." *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Collective maltreatment on the basis of faith and national origin sends the strongest possible message of official disfavor—evoking some of the most sordid episodes in American history. "We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind." *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015). The Executive Order communicates loudly and clearly that Muslims are a disfavored class. That is not a message that the government can or should convey. "When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship." *McCreary*, 545 U.S. at 883

(O'Connor, J., concurring). The constitutional violations here are forthright and flagrant.

B. The Balance Of Harms And The Public Interest Favor The Preliminary Injunction.

The preliminary injunction is appropriate to protect against imminent and unconstitutional discrimination. If the replacement Executive Order were allowed to take effect, Plaintiffs and countless others would suffer harms for which there would be no adequate remedy. *See* Pls.' Mot. Prelim. Inj. 30–36. Indeed, because the Executive Order violates First Amendment rights, those injuries are irreparable as a matter of law. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190 (4th Cir. 2013) (en banc); *Giovani*, 303 F.3d at 520–21.

Additionally, "upholding constitutional rights surely serves the public interest." *Giovani*, 303 F.3d at 521; *accord Aziz*, 2017 WL 580855, at *10 ("enjoining an action that is likely a violation of the Establishment Clause serves the public interest, particularly in the absence of evidence to support the government's asserted national security interest").

On the other side of the scales, the government broadly asserts (Br. 54) that judicial review of "a national-security judgment of the President" offends the public interest. And indeed, the replacement Executive Order was designed specifically to "avoid" that review, which doomed the order's forebear. *See* Exec. Order No. 13,780 § 1(i). But the government has no legitimate interest in enforcing unconstitutional policies. And it has no legitimate interest, much less a compelling one, in discriminating on the basis of religion or national origin. In fact, the Department of Homeland Security has reached the opposite conclusion. *See* Zapotosky, *DHS Report*, *supra*. And as for insulating the President's Muslim ban against judicial review, the federal courts are an essential constitutional safeguard against governmental overreach. To say that judicial review is counter to the public interest runs directly contrary to the basic principles on which our system of government is founded.

The harms to Plaintiffs and countless others from the replacement Executive Order are imminent and extreme; the putative harms to the government are both fanciful and not legally cognizable. All factors favor the preliminary injunction.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the word limit set by this Court's docket correction notice of April 3, 2017 (Doc. 78), because it contains 6,476 words, excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Richard B. Katskee

CERTIFICATE OF SERVICE

I certify that on April 19, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system. I further certify that in accordance with the Court's order, sixteen paper copies of the brief are being filed with the Clerk of Court by overnight carrier.

/s/ Richard B. Katskee

APPENDIX OF *AMICI CURIAE*

Members of the Clergy

Amici include 5 members of the clergy who practice and promote the values of the Christian faith and worry about the government's harmful message of judgment and condemnation to our Muslim brothers and sisters. As Christian leaders, we are obligated to lead in matters of faith and to defend our freedom of religion from governmental intrusion. Among other concerns, the Executive Order risks being misunderstood as representing our faith, furthering the inaccurate and harmful narrative that America is a "Christian Nation"—a message that we strongly reject. And the Executive Order will correctly be interpreted by the world as bare discrimination against Muslims. It is precisely actions of this nature that perpetuate inaccurate narratives and harmful stereotypes and undermine the arduous path to peace between the world's two largest faiths.

Although the Executive Order's discriminatory treatment of Muslims will be interpreted by many in the global community as a statement from Christians, it does not represent our will or our position as the actual representatives of our faith. As Christian leaders, we did not and do not request preferential treatment for adherents of our faith. The mere risk of appearance that the American government is in any way, shape or form representing the Christian faith with this action is of grave concern to us and should be to the courts and to the American people, regardless of their faith affiliation. Whether this trespass of our sovereign agency is intentional or not is inconsequential to our fundamental opposition. This order is an embarrassing distortion of everything we profess and it stands to harm our cause domestically and abroad. We descend from a lineage of martyrs who modeled self-sacrifice, not self-protection. We take seriously the responsibility of continuing a legacy of welcoming foreigners and loving our neighbors as ourselves. We embrace this responsibility gladly and join our colleagues in asking the Court permanently to reject this Executive Order.

The Riverside Church in the City of New York

The Riverside Church is an inter-denominational church, influential on the nation's religious and political landscapes. We are an interdenominational, interracial, international, open, welcoming, and affirming church and congregation. The Riverside Church in the City of New York seeks to be a community of faith. Its members are united in the worship of God known in Jesus, the Christ, through the inspiration of the Holy Spirit. The mission of the Church is to serve God through word and witness; to treat all human beings as sisters and brothers; and to foster responsible stewardship of all God's creation.

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that represents more than 125,000 members and supporters across the country. Its mission is to advance the free-exercise rights of individuals and religious communities to worship as they see fit and to preserve the separation of church and state as a vital component of democratic governance. Americans United has long defended the fundamental rights of religious minorities in the United States by bringing and participating in legal challenges to governmental action that singles out particular religions for favor or disfavor. *See, e.g.*, *UMAA v. Trump*, No. 17-cv-00537 (D.D.C.) (counsel to plaintiffs); *Ziglar v. Abbasi*, 2016 WL 7473962 (U.S. 2016) (supporting Muslim petitioners who had overstayed their visas and were detained and tortured after terror attacks of September 11, 2001, before being released as innocent of any connection to terrorism); *Hassan v. City of New York*, 2014 WL 3572027 (3d Cir. 2015) (supporting challenge to New York City Police Department's surveillance of Muslim communities); *Awad v. Ziriax*, 2011 WL 2118216 (10th Cir. 2012) (supporting challenge to Oklahoma law that singled out Islam for official disfavor).

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Southern Poverty Law Center

The Southern Poverty Law Center has provided *pro bono* civil-rights representation to low-income persons in the Southeast since 1971, with particular focus on seeking justice for the most vulnerable people in society. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees, to ensure that they are treated with dignity and fairness. *See, e.g.*, *UMAA v. Trump*, No. 17-cv-00537 (D.D.C.) (counsel to plaintiffs). SPLC monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing governmental action premised on unlawful discrimination that undermines the promise of civil rights for all.